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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GERVIN ROLANDO COLINDRES,

Defendant and Appellant.

B300273

(Los Angeles County
Super. Ct. No. BA354618)

APPEAL from an order of the Superior Court of Los Angeles County, Katherine Mader, Judge. Appeal dismissed.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Scott A. Taryle and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

In January 2010 appellant Gervin Rolando Colindres pleaded nolo contendere to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(2)),¹ and admitted an enhancement allegation that he personally used a firearm in the commission of a felony (§ 12022.5, subd. (a)). The court accepted the plea and found the enhancement allegation true. The court sentenced Colindres to a prison term of 13 years and imposed a \$30 court security assessment (§ 1465.8, subd. (a)(1)), a \$30 criminal conviction assessment (Gov. Code, § 70373), a restitution fine of \$200 (§ 1202.4, subd. (b)), and a \$200 parole revocation restitution fine (§ 1202.45). The parole revocation restitution fine was stayed and the stay is to become permanent upon successful completion of parole. The court subsequently ordered Colindres to pay victim restitution in the amount of \$1,672.69. (§ 1202.4, subd. (f).) It does not appear from our record that Colindres objected in the trial court to the assessments, fines, or restitution order, or that he challenged them by direct appeal.

Nine years later, in June 2019, Colindres filed in the superior court a “motion to recall sentence.” Colindres stated that the court did not give him a hearing to determine whether he had the ability to pay the restitution fines prior to imposing them in 2010.² He relied on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) and its progeny for the legal foundation of his motion. He asserted the trial court had jurisdiction to decide the motion under section 1237.2.

The trial court summarily denied the motion on June 10, 2019.

¹ Unless otherwise indicated, statutory references are to the Penal Code.

² Colindres also argued that his counsel was ineffective by failing to object to the fines at the time of sentencing. He does not reassert this argument on appeal.

On appeal, Colindres argues that, under *Dueñas*, the trial court was required to consider his ability to pay assessments and fines prior to imposing the fines and that we should direct the court to hold a hearing for that purpose. He further argues that we should direct the trial court to stay the execution of the restitution fine and the order for victim restitution.

After Colindres filed his opening brief, this court decided *People v. Torres* (2020) 44 Cal.App.5th 1081 (*Torres*). In that case, the trial court imposed certain assessments and a restitution fine as part of the defendant's sentence. (*Id.* at p. 1084.) The defendant did not challenge the assessments or fine on appeal. More than one year after his appeal had concluded, he filed a motion in the superior court for modification of the restitution fine on the ground that the court imposed the fine without determining whether he had the ability to pay it. The court denied the motion. On appeal to this court, the defendant contended that the trial court had jurisdiction to decide his motion under section 1237.2. We rejected the argument and dismissed the appeal. (*Torres, supra*, at pp. 1084–1089.)

The pertinent part of section 1237.2 provides: “The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs upon the defendant's request for correction.” As we explained in *Torres*, the jurisdiction that this language created “does not extend beyond the pendency of a defendant's direct appeal from his or her judgment of conviction.” (*Torres, supra*, 44 Cal.App.5th at p. 1088.) Because the defendant made his motion after his appeal had concluded, section 1237.2 was of no help to him. Because the trial court did not have jurisdiction to grant his motion on any other basis, the order denying the motion was nonappealable.

(*Torres, supra*, at p. 1084.) We therefore dismissed his appeal. (*Id.* at pp. 1088-1089.)

In the instant case, we requested that the parties brief the question whether we should dismiss this appeal based on *Torres*. Each side filed a supplemental brief.

We agree with the Attorney General that *Torres* is on point and dispositive. Section 1237.2, upon which Colindres relied below and in his opening brief on appeal, does not apply because that statute provides for trial court jurisdiction during the pendency of a defendant's direct appeal only (*Torres, supra*, 44 Cal.App.5th at p. 1088), and Colindres's time to appeal expired nine years before he filed his motion. As in *Torres*, the trial court's order denying the motion is nonappealable and, therefore, the appeal must be dismissed.

Colindres contends that, as an alternative to section 1237.2, the trial court had jurisdiction to decide his motion because the imposition of fines without finding an ability to pay is an unauthorized sentence. It is true that courts have the power to correct an unauthorized sentence notwithstanding a defendant's failure to object at the time of sentencing. (*Torres, supra*, 44 Cal.App.5th at p. 1085; *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205). An unauthorized sentence, for this purpose, is one that "could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*).) Thus, a sentence that "violates mandatory provisions governing the length of confinement" (*ibid.*) or imposes an amount of restitution that exceeds a statutory maximum (*People v. Zito* (1992) 8 Cal.App.4th 736, 740–742) is unauthorized and correctable at any time; but a sentence that is "otherwise permitted by law" but is "imposed in a procedurally or factually flawed manner" (*Scott, supra*, 9 Cal.4th at p. 354) or is correctable only by "considering factual issues presented by the record or remanding for additional

findings” (*People v. Smith* (2001) 24 Cal.4th 849, 853 (*Smith*)) does not come within the unauthorized sentence exception.

The assessments, restitution fine, and victim restitution that Colindres challenges are not unauthorized sentences. The amounts imposed were permitted by law and, even if we accept Colindres’s argument that he was entitled to an ability to pay hearing, merely “imposed in a procedurally or factually flawed manner” (*Scott, supra*, 9 Cal.4th at p. 354) that would be correctable only by “remanding for additional findings” (*Smith, supra*, 24 Cal.4th at p. 853). As we explained in *Torres*, a “claim under *Dueñas*, which is based upon factual arguments concerning [the defendant’s] ability to pay,” does not come within the unauthorized sentence exception to the rule that courts may not vacate or modify a sentence after its execution has begun. (*Torres, supra*, 44 Cal.App.5th at p. 1085.)

Because neither section 1237.2 nor the unauthorized sentence exception provided the trial court with jurisdiction to decide Colindres’s motion, the order denying that motion was nonappealable and his appeal must be dismissed. (*Torres, supra*, 44 Cal.App.5th at p. 1088.)

DISPOSITION

The appeal is dismissed.

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ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.